INDEX

CASES CITED

STATUTES

552398—43

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 319

WILLIAM DAVIES CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (S. R. 233–240)[1] is reported in 135 F. (2d) 179. The findings of fact, conclusions of law, and order of the National Labor Relations Board (B. A. 319–340) are reported in 37 N. L. R. B. 631.

[1] The appendices filed by the Board and the company in the court below are referred to as "B. A." and "R. A.", respectively. The supplemental proceedings in the court below have been bound into the company's appendix (pp. 233–245) and are referred to as "S. R."

JURISDICTION

The decree of the court below (S. R. 242–244) was entered on June 7, 1943. A petition for rehearing filed by petitioner (S. R. 241) was denied on May 20, 1943 (S. R. 241). The petition for a writ of certiorari was filed on September 3, 1943.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether there is substantial evidence supporting findings of the Board, which were sustained by the court below, that petitioner by various anti-union statements, by prohibition of all talk of the union among its employees on company property, and by the discriminatory discharge of two employees, engaged in unfair labor practices within the meaning of Section 8 (1) and (3) of the Act.

2. Whether the Board's order abridges petitioner's freedom of speech in violation of the First Amendment.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infra*, pp. 13–14.

STATEMENT

Upon the usual proceedings, the Board issued its findings of fact, conclusions of law, and order (B. A. 319–340). The facts, as found by the Board and as shown by the evidence, may be summarized as follows:[2]

About the middle of December 1939, within a few days of the initiation of union activity in its plant, petitioner's production superintendent, Henry Wichmann, warned employee John Canning that "there are men walking the streets today that are laid off on account of trying to organize a union" (B. A. 322; 82, 181, 183, 197–198). Shortly thereafter, Foreman McMahon, questioned employee Paul Ahern as to the identity of the individual who "started the Union" in the plant, accused Ahern himself of "organizing the union," and questioned employee John Boland concerning the Union's strength (B. A. 323; 166–168). Early in January 1940, while the union membership campaign was in progress, General Manager Brennan, upon granting a promised wage increase to employee James McNally, the union shop steward in the smokehouse, pointed out to McNally that he was now receiving higher wages than "the fellows across the street although they have a contract there"

[2] In the following Statement, the references preceding the semicolons are to the Board's findings, and the succeeding references are to the supporting evidence.

(B. A. 323; 138–139). At about this time Michael Moriarity, an ordinary laborer in the plant, when accused of soliciting union membership on company time, was summoned before petitioner's top-ranking plant officials, together with petitioner's superintendent of production in Canada, and questioned for over an hour concerning his views on unions and his part in the organizational activity in the plant: he was asked about the "difficulty" in the plant; was informed that petitioner did not believe its employees would "go for a union because of the dues"; was accused of being "the head organizer here," and of distributing leaflets; when he denied the charges he was interrogated as to the identity of the union leaders (B. A. 323–324; 90–91, 123, 126–127).

On January 6, petitioner posted a notice in its plant forbidding "solicitation for membership in or collection of dues for a labor association" on its premises, on pain of dismissal (B. A. 325; 318). This notice prohibited only union solicitation, permitting, as in the past, solicitation for projects of which petitioner approved (B. A. 327–328; 57–58, 145, 233). Furthermore, although specifically limited to solicitation and the collection of dues, petitioner interpreted it to prohibit even casual mention of the Union among union members (B. A. 328; 266, 272, 138, 139–140), even though conversation on a variety of other subjects had always been and continued to be permitted in the plant (B. A. 328; 60, 97–98, 133, 208). Peti-

tioner's contention at the hearing that the notice was necessitated by an alarming drop in production caused by widespread unrest, due to union activity in the plant, was not supported by the record. The "alarming drop in production" occurred in only one department, and for only a few days before the notice was posted; it occurred at a time when there were production difficulties in other departments and admittedly could have been caused by a number of factors totally unrelated to the union activity (B. A. 327; 238–244). Petitioner had made no investigation to determine the real cause of the drop in production, but merely assumed it was due to union activity, although at the time it had not actually witnessed any instance of union solicitation (B. A. 325–327; 246, 268, 299–300). Petitioner stated that the "unrest" in the plant was due to arguments taking place among the employees (B. A. 326; 240). It appeared, however, that there was always a great deal of argument in the plant on various topics, such as politics, religion, and sports, that such argument was freely permitted, and that in the instant case petitioner had no first-hand knowledge, with the exception of one remark overheard by one of its supervisors, as to what the arguments were about (B. A. 326; 245–246, 258–260, 283–284, 298–299).

The Board found that petitioner, by the foregoing statements and activities, interfered with, restrained, and coerced its employees in the exer-

cise of the rights guaranteed in Section 7, thereby violating Section 8 (1) of the Act (B. A. 328–329, 339).

The Board found further (B. A. 331, 336, 338) that petitioner violated Sections 8 (3) and (1), in that it discriminatorily discharged James McNally on January 22, 1940, and John Canning on January 29, 1940, because of their union membership and activity.

McNally was union steward in petitioner's smokehouse (B. A. 329; 136–137, 141–142) and was active in the organizational activity in the plant. Two days after the posting of the notice prohibiting union solicitation, he was warned by Superintendent Wichmann not to "talk unionism" even in his free time (B. A. 329; 138); and when he was granted a promised wage increase early in January, Plant Manager Brennan reminded him pointedly that he was now receiving more pay than "the boys across the street" who were operating under a union contract (B. A. 330; 138–139).

On the morning of January 22, as McNally, in the course of his duties, happened to pass the workbench of employee Stevens, he noticed that Stevens, a union member, was not wearing his union button. He asked him where it was. Stevens replied that it was in his pocket. McNally thereupon remarked that that was "a hell of a place to have it" and went on about his business (B. A. 330; 139–140). The entire episode took only a few seconds. It was witnessed by Manager Bren-

nan, who immediately questioned Stevens and then summoned McNally to Wichmann's office. In Brennan's presence, Wichmann reminded McNally that he had warned him on two previous occasions about "talking union" during working hours, and peremptorily discharged him on the ground of bothering and interfering with other employees (B. A. 330; 140–141, 250–251). Petitioner subsequently stated that McNally was discharged because he had "broken a company rule" and that the discharge was "a disciplinary measure" (B. A. 330; 156–157, 272). The notice of January 6, however, was specifically limited to "union solicitation and the collection of dues," activities in which McNally was not engaged. There was no rule against general conversation in the plant, and in the past employees had not been disciplined for participating in conversation upon a wide variety of topics (B. A. 328; 60, 97–98, 133, 208).

Canning was union steward in the vein pumping department and was active in the union organizational activity in the plant. Even before he joined the Union, petitioner warned him that "men are walking the streets because of trying to organize a union" and later commented sarcastically on his union stewardship (B. A. 334; 172–173, 183, 197–198). On January 29, Canning failed to insert a sufficient amount of pickle into the butt end of a ham (B. A. 334–335; 173). He was immediately and summarily discharged (B. A. 335; 292) despite the fact that this was the first occasion

petitioner had to complain about Canning's work in his 15 months' employment (B. A. 179), and that Canning explained that he had stopped pumping pickle because he thought the vein was about to rupture (B. A. 335; 175, 187, 292, 176–177). After his discharge, petitioner accused Canning of responsibility for spoiling three other hams (B. A. 335; 177) and inquired whether Canning had a grievance against the company, hinting that it considered him guilty of sabotage (B. A. 335; 176, 190–191). Petitioner introduced no evidence whatever to show that spoilage of these three hams could in any way be attributed to Canning. Still later, at the hearing, petitioner accused Canning of being a "cut-up" (B. A. 335; 224), a matter not previously mentioned.

Upon the foregoing findings, the Board ordered petitioner to cease and desist from discouraging membership in the Union or any other labor organization of its employees by discharging or refusing to reinstate any of its employees, or in any other manner discriminating in regard to the hire and tenure of employment, or any term or condition of employment of its employees; to cease and desist from in any manner interfering with, restraining or coercing its employees in the exercise of the right of self-organization; to offer to McNally and to Canning immediate and full reinstatement to their former (or substantially equivalent) positions, without prejudice to their seniority and other rights and privileges; to make

McNally and Canning whole for any loss caused them by petitioner's discrimination against them by awarding them back pay; and to post appropriate notices (B. A. 339–340).

On September 28, 1942, the Board filed in the court below a petition to enforce the Board's order (B. A. 1–4). On June 7, 1943, the court entered a decree (S. R. 242–244), enforcing the Board's order except for modifications not here in issue.

ARGUMENT

1. Aside from petitioner's attempt to find a free-speech issue in the case, its petition for certiorari presents only the issue of the substantiality of the evidence supporting the Board's findings (Pet. 9–10, 13, 16–26). This issue presents no question of general importance. Moreover, the facts found by the Board and summarized in the Statement, *supra*, pp. 3-8, furnish ample support for the challenged findings, as the court below held (S. R. 236–237). The cases cited as presenting an alleged conflict (Pet. 10–11, 17–18, 23–26) turn upon their own facts. The decision in *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.*, 316 U. S. 105, forecloses petitioner's contention (Pet. 23–26) that the Board may not properly find that an unfair labor practice has been committed where the record contains evidence which would also support a contrary finding.

2. The case presents no free-speech issue since every provision of the Board's order is fully supported by the finding that petitioner discriminatorily discharged two employees. Nor is there merit to petitioner's contention (Pet. 9, 14–15) that its statements about the Union and its inquiries concerning the identity of union members by its supervisors and officials (*supra*, pp. 3–5) constitute an exercise of the right of free speech and expression protected by the First Amendment. This contention depends upon an issue of fact, *i. e.*, whether the statements and inquiries may fairly be considered to have constituted interference with, coercion, or restraint of the rights guaranteed to petitioner's employees by Section 7 of the Act. The right of free speech does not include the right to coerce employees through speech or otherwise. *National Labor Relations Board* v. *Virginia Electric and Power Company*, 314 U. S. 469, 477. The statement of Plant Superintendent Wichmann that "there are men walking the streets today that are laid off on account of trying to organize a Union" was clearly coercive and was recognized as such by its recipient (*supra*, p. 3; see also B. A. 334; 200). The elaborate interview of petitioner's officials with Moriarity, an ordinary laborer in the plant, in which the officials probed into the internal affairs of the Union and accused Moriarity of being "the head organizer" and of passing out Union literature, together with other

inquiries concerning the Union's organizational structure, the pointed suggestion that petitioner's employees without a union were better paid than other employees operating under a union contract, and the posting of the discriminatory notice forbidding union solicitation on plant premises cannot be deemed merely the innocent expression of petitioner's opinion. Such statements and actions were intrinsically coercive, made for the purpose of restraining the employees' adherence to the Union and coercing their judgment in respect to it. They were not, as petitioner asserts, trifling, inconsequential, and of no significance. They constituted, as the Board found upon the whole record, an attempt to defeat the union membership drive, and interference with rights guaranteed by the Act (B. A. 324–325, 328–329). The court below expressly concurred in this finding (S. R. 236).

Nor is there a conflict, as petitioner asserts (Pet. 9–10, 14–17), with various cases cited from other circuit courts of appeals. None of those cases holds that statements of an employer which are coercive or intimidatory are protected by the First Amendment; on the contrary, in each of them the court recognized that communications which may reasonably be said to coerce employees are outside the range of constitutional protection. The inquiry in each case was directed to the question whether the Board's findings that the statements were coercive was supported by substantial

evidence. Those cases turned, as does the present one, upon their particular facts.

CONCLUSION

The decision below sustaining the Board's findings and order is correct and presents neither a conflict of decisions nor any question of general importance. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

ROBERT B. WATTS,
General Counsel,

RUTH WEYAND,
MARGARET M. FARMER,
Attorneys,
National Labor Relations Board.

SEPTEMBER 1943.